Vermont Bar Examination
July 2013
Model Answer 3

1. The State could have asserted that Correction Officer Bannon lacked standing as a plaintiff because his challenge to the mandatory retirement statute was arguably not ripe based on his having not yet reached age 55 at the time of the first lawsuit. As discussed in *Brigham v. State*, 179 Vt. 525, 527-528 (2005), Vermont has adopted the case-or-controversy requirement of Article III of the U.S. Constitution. A court has the power only to "determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Parker v. Town of Milton,* 169 Vt. 74, 77, 726 A.2d 477 (1998). One element of the case or controversy requirement is that a plaintiff "must have standing, that is, [he or she] must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law." *Id.* The existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance." *Id.*[1]

Lack of standing, and as such lack of subject matter jurisdiction, could have been asserted via a Rule 12(b)(6) motion to dismiss prior to filing an answer. Absent that, this defense could be raised at any time during the litigation, by any party or by the Court sua sponte, because the defense of subject matter jurisdiction cannot be waived.

2. Under the precedent of *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367, 10 A.3d 469, statutes are presumed to be reasonable and constitutional. A plaintiff has the burden to overcome this presumption.

The Common Benefits Clause, Article 7 of the Vermont Constitution provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const. ch. I, art. 7. The test for constitutionality under the Common Benefits Clause is different from that applicable under the Equal Protection Clause of the U.S. Constitution.

When a statute is challenged under Article 7, the first question is what "part of the community" is disadvantaged by the law. Here, it is state corrections officers who reach age 55.

[1] Text taken from *Nolen v. State*, 2009 WL 2411832, 2 (Vt.) (Vt.,2009).

The next question is examination of the governmental purpose for the classification, as any statutory exclusion from publicly-conferred benefits and protections must be premised on an appropriate and overriding public interest. Having a mentally and physically capable corrections officer force is an appropriate or highly important purpose.[2]

The final determination under Article 7 is whether the mandatory retirement provision bears a reasonable and just relationship to legitimate state interests. In evaluating whether the mandatory retirement statute bears a reasonable and just relation to the governmental purpose, *Baker* identifies three factors that may be considered: (1) the significance of the benefits to the excluded group; (2) whether the omission of a part of the community promotes the government's stated goals; and (3) whether the classification is overinclusive or underinclusive.

Plaintiffs' evidence is to the effect that fitness testing can be used to achieve the same goal for which the mandatory retirement age exists, and that Corrections Officer Appleman himself was fit for duty. Thus, the primary factor of interest to Plaintiffs is an argument that the classification is overinclusive given the available alternative of fitness testing. Given that there was competing evidence, it was at least debatable for the Legislature to choose mandatory retirement vs. a physical fitness testing regimen to determine retirement age. Because of the deference to which the Legislature is entitled, competing evidence which renders the question debatable requires a court to uphold a law as not violative of the Common Benefits Clause.

For these reasons, the court's ruling that the statute is constitutional was correct.

3. Claim preclusion and issue preclusion are the two possible theories requiring examination.

The rule of claim preclusion applies when the parties, subject matter, and causes of action in a previous litigation, where the court has issued a final judgment, and in a subsequent litigation are the same or substantially identical. It precludes the parties from relitigating not only those claims that were previously litigated, but also those that should have been raised in previous litigation. Causes of action may be regarded as the same for purposes of claim preclusion where the same evidence will support the action in both instances.

[2] *Baker*, 170 Vt. at 206, 744 A.2d at 873.

Issue preclusion prevents a party from relitigating an issue that was previously litigated and decided. Relitigation is prohibited when (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair.

Claim preclusion should not be applicable here because a mandatory retirement age of 55 and a mandatory retirement age of 52 are different enough subjects that different evidence might be introduced regarding each case.

Issue preclusion may apply. It would have been necessary for the Superior Court's Common Benefits Clause analysis in the first lawsuit to determine whether physical capability of state corrections officers is an important public interest, and that issue would also be required to be determined in the second lawsuit. Thus, the State could satisfy criteria (1), (2) and (3) for issue preclusion on the question of public interest in maintaining a physical fit corrections officer force. Assuming that criteria (4) and (5) were met, the State should be able to successfully assert issue preclusion as to the public interest in having a physically fit corrections officer force.

Model Answer 4

1. The 1980 trust will have no effect on the disposition of Susan's property. Although the trust is valid, because Susan never re-titled any of her assets in the name of the trust, no property will pass through the trust. Susan's 2010 revocation of the trust was not effective because the trust was meant to be irrevocable. However, as the trust held no property, the trust will have no effect on the disposition of the property. Rather the property will pass through Susan's will and through the laws of intestate succession.

2. Susan's 2010 Will is most likely valid. To make a will, a person must be of age and sound mind. *14 V.S.A.§ 1*. A testator is of sound mind, and possesses testamentary capacity, if he or she has sufficient mind and memory when making the will (1) to remember the natural objects of his or her bounty; (2) to recall his or her property; and (3) to dispose of it understandably according to a plan he or she formed. *In re Estate of Burt,* 122 Vt. 260, 169 A.2d. 32.

By law, a will cannot convey real or personal property unless it is (1) in writing; (2) signed by the testator, or by the testator's name written by another person in the testator's presence and at the testator's express direction; and (3) attested and subscribed by two or more credible witnesses in the

presence of the testator and of each other. *14 V.S.A. § 5.* Prior to the Legislature amending the statute in 2005, Vermont law required three credible witnesses for a will to be valid.

Vermont's statutory scheme does not include a provision for holographic wills. Thus, the Court has inferred that the Legislature did not intend to exempt handwritten wills from the formal execution requirements of 14 V.S.A. § 5. *In re Estate of Cote,* 2004 VT 17, 176 Vt. 293, 848 A.2d 264.

The facts suggest that Susan's 2010 will is valid. If Susan created a trust in 1980, she was of age when she signed the will in 2010. Nothing in the facts suggests that Susan lacked testamentary capacity when she executed it. The facts indicate that the will conveys "all of Susan's property" according to an understandable plan. Further, Henry reports that Susan "was mentally competent throughout her life." In that Henry, having been left out of the will, is most likely to benefit from a conclusion that Susan was not of "sound mind" when she executed the will, his statement that she was is somewhat significant.

The fact that the will does not mention Henry does not render the will invalid. However, Henry does have rights as Susan's surviving spouse and he may elect those rights against her will.

Finally, the will is written, signed by Susan, and witnessed by two others. There is nothing in the fact pattern to suggest that the witnesses are not credible or that they failed to sign the will in the presence of Susan and each other. Thus, it appears as if the will meets the statutory requirements for a validly executed will. As such, it is of no consequence that the will is handwritten.

For these reasons, Susan's 2010 will is most likely valid.

3. Susan's will must be proved and allowed in the probate division of the Vermont Superior Court. *14 V.S.A. § 101.* Within 30 days of learning of Susan's death, the custodian of her will must deliver it to the executor or to the probate court where venue lies. *14 V.S.A. § 103.* The executor shall then file a petition to open a probate estate. *14 V.S.A. § 105.* Within 30 days after appointment, the executor or administrator shall prepare an inventory, file it with the probate division, and serve copies in a manner consistent with the rules of probate procedure. *14 V.S.A. § 1051.*

Any dispute as to Susan's will will be resolved in the probate division of the Superior Court. Once a claim challenging the will is filed, all interested persons will be considered parties and are entitled to notice of

the probate matter. *Vermont Rules of Probate Procedure, Rule 17(a).* The rule defines an "interested person" as Susan's "heirs, devisees, legatees, children, spouses, and such other persons as the court direct" *V.R.P.P. 17(a)(1).* It also includes the trustee of any trust to which assets of Susan's estate might be distributed. Id.

The dispute will be governed by the Rules of Probate Procedure. If the matter proceeds to a hearing, the Rules of Evidence apply unless otherwise stated, *V.R.P.P. 43(a)*, and the court shall make findings of fact and conclusions of law. *V.R.P.P. 52.* An appeal may be taken to the Civil Division of the Superior Court and, from there, to the Vermont Supreme Court.

The probate division of the Vermont Superior Court is also the forum in which any disputes involving the "Susan Simpson Irrevocable Trust" will be resolved. *V.R.P.P. 17(2).* The reason is that the Vermont Trust Code applies to the Trust. The same Rules of Probate Procedure that apply to disputes over Susan's will, will also govern disputes regarding the trust.

4. Susan's estate should be distributed as follows: one half to Henry and one half to the local animal shelter. It is possible that half of the share to be distributed to the animal shelter will be distributed to another charity that serves a similar charitable purpose to the defunct theater company. If the Court applies the cy pres doctrine and determines that the bequest to the theater company can be satisfied by giving the bequest to another organization serving a similar charitable purpose, then the Court has the power to modify the trust in a manner consistent with Susan's charitable intent. If this is not possible, the entire one-half share remaining after Henry's spousal share will go to the animal shelter.

Model Answer 5

1. The Court was mostly correct in denying Davis's motion to suppress.

Any statements stemming from "custodial interrogation" are subject to suppression unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination, i.e., the *Miranda* warnings that the defendant has the right to remain silent and the right to the presence of an attorney during questioning. *Miranda v. Arizona*, 384 U.S. 436 444–45 (1966). Further, to be admissible, evidence must be relevant and its probative value must not be outweighed by the danger of unfair prejudice. V.R.E. 402; V.R.E. 403.

The court's ruling with regards to the first statement—"I'll get you yet, Vincent! Don't think I'll be buying any more pot from you!"—was partially correct and partially incorrect. This statement was not taken in violation of Davis's *Miranda* rights. When the first statement was made, although Davis was being restrained by other party-goers, he was not being restrained by the police. Thus, he was not "in custody" such that *Miranda* warnings would be required.

Further, the statement was made voluntarily, not in response to police questioning. Thus, the statement was not the product of "interrogation" and should not be suppressed under *Miranda.*

As for relevancy, the first part of this statement is relevant to the issue of intent. Given Davis's testimony that he did not deliberately fire the gun, his intent was a central issue. The first part of the first statement supports the inference that Davis was angry at Vincent and that, rather than accidentally firing the gun, he purposefully fired the gun at Vincent with an intent to kill. There is nothing improperly prejudicial about this part of the statement, so it was properly admitted. In contrast, the second part of the first statement, pertaining to the purchase of marijuana, should have been excluded as overly prejudicial, given its marginal relevance (showing that Davis knew Vincent and had prior dealings with him) and its content (a drug deal which has nothing to do with the incident and is likely to improperly put Davis in a bad light, as a drug user).

The court's ruling with regards to the second statement—"I can't believe I missed him."—was correct. Davis was in custody at the time the statement was made, so the officer would have been required to advise him of his *Miranda* rights prior to questioning. Similar to the first statement, however, the second statement was made voluntarily, not in response to police questioning. Thus, the statement was not the product of "interrogation" under *Miranda*. Further, the second statement, like the first part of the first statement, was relevant to the issue of intent and was not improperly prejudicial.

2. The Court was correct in denying Davis's jury charge request.

As a general rule, when evidence at trial reflects two or more criminal acts, but a defendant is charged with only one such act, the State must identify the act that it invokes as the basis for conviction to avoid the risk that certain jury members will base a conviction on one act, while others base it on another, thereby defeating the unanimity of the jury's verdict. *State v. Zele*, 168 Vt. 154, 158, 716 A.2d 833, 836 (1998). However, no such election is required when "numerous acts are so related as to constitute a single transaction or offense." *Id.* at 158, 716 A.2d at 836–37.

Here, Davis fired the various shots within a span of minutes, if not seconds. The shots were all part of a continuous course of events that began when he pointed his gun at Vincent's face and ended when he was subdued by other partygoers. Further, Davis offered the same defense to each of the three gunshots—that he did not fire the gun at Vincent and had no intent to hurt him or anyone else. Given these facts, the Court was not required to give a unanimity instruction pertaining to the gunshots.

3. The Court was incorrect in granting Davis's motion for a new trial.

In order to show that an extraneous influence on a juror warrants a mistrial, a defendant must show " that an irregularity occurred" and that it "had the capacity to affect the jury's result." *State v. Abdi*, 2012 VT 4, ¶ 13, 191 Vt. 162, 45 A.3d 29. Once a defendant sets forth sufficient evidence that an irregularity occurred and that it had the requisite capacity to affect the verdict, the State bears the burden of demonstrating that the irregularity did not actually prejudice the

jurors against the defendant, generally but not exclusively by demonstrating that the error was harmless beyond a reasonable doubt. *Id.* ¶¶ 13–14, 191 Vt. ——, 45 A.3d 29.

Here, the juror's out-of-court conversation with the officer did not have the capacity to affect the jury's verdict, nor did it actually affect the verdict, for several reasons: (1) the content of the communication between the officer and the juror did not relate to a material issue in the case; (2) there was nothing inflammatory about the out-of-court conversation; (3) the officer did not attempt to exert influence upon the juror; (4) Officer O'Neill was a minor witness and her testimony was uncontroversial, such that her credibility was not central to the case; and (5) the juror testified that her knowledge of the officer did not affect how she viewed the evidence.

Model Answer 6

1. Partnership. In Vermont, a partnership is formed whenever two or more individuals are engaged as co-owners in a business for profit. 11 V.S.A. § 3212. The partners need not intend to form a partnership, rather, a partnership may be formed by operation of law without any official filing or other writing required. However, there must be an express or implied agreement among the partners to share profits and losses. *See, e.g., Milosky v. Wilhelm,* 130 Vt. 63, 68 (1971). While not required to legally form a partnership, it is highly recommended that Alex and Bernard prepare a Partnership Agreement setting out their respective interests and obligations to one another and the partnership.

   S-Corporation. To form an S-Corporation, the incorporators first need to form a corporation under state law; in Vermont, this would be accomplished by filing Articles of Incorporation with the requisite fee with the Vermont Secretary of State. Among other things, the Articles would need to designate an Agent for Service of Process, designate the number of shares authorized to be issued, and be signed by the incorporator. While not required to legally form the entity, it is highly recommended that Alex and Bernard prepare a Shareholder Agreement setting out their respective interests and obligations to the entity, and the process for transferring shares in the corporation. (In addition, an outstanding answer will note that the incorporators would need to file an election form with the Internal Revenue Service indicating that the corporation is to be treated as a Subchapter S Corporation under for federal tax purposes.)

   Limited Liability Company. To create a Limited Liability Company ("LLC"), the organizers would need to file Articles of Organization , along with the requisite fee, with the Vermont Secretary of State. Among other things, the Articles would need to designate an Agent for Service of Process, state the names of the Managers or Managing Member, and be signed by the organizer. While not required to legally form the entity, it would be highly advisable to have Alex and Bernard prepare an Operating Agreement setting

out their respective interests and obligations to the LLC, and the process for transferring membership interests in the LLC.

2. Partnership. A general partnership is the riskiest of the three types of business entities because absent any agreement to the contrary, profits and losses will be shared equally, under the default partnership rules discussed above. Further, a partnership offers the individual partners no protection from personal liability for debts or obligations of the partnership – all partners are jointly and severally liable for any obligation incurred by the other partner(s) on behalf of the partnership. However, one benefit of a partnership is that income, losses, deductions and credits of the partnership are passed from the partnership to each partner proportionally and assessed at his or her individual tax rate ("pass through taxation").

   S-Corporation. Incorporating the business as a Vermont corporation would limit Alex and Bernard's personal liability for the debts of the corporation, since such obligations are solely recoverable from the assets of the corporation. In addition, like partnerships, S corporations enjoy pass through taxation, so income, losses, deductions and credits are assessed to the shareholders at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. However, only US citizens may form S-Corporations, however, so this option is not available to Alex and Bernard, since under these facts, it appears that Bernard is a Canadian citizen.

   Limited Liability Company. An LLC has both the advantage of pass through taxation, as discussed above, and limited personal liability to the individual members for the corporation's debts and obligations. Given this, and given that an S-Corporation is not an available corporate form for Alex and Bernard, this appears to be the best fit for their situation.

3. Partnership. As described above, partners in a general partnership are generally held personally liable for the partnership's debts and obligations, jointly and severally. The bank could therefore collect the entire $100,000 from Alex or Bernard, or a portion thereof from each, up to the total amount.

   S-Corporation and Limited Liability Corporation. Generally, shareholders (and Members of an LLC) are not personally liable for debts of the corporation (or LLC) absent fraud or other facts showing that the corporate veil should be "pierced," see below. Therefore, debt could generally not be collected from the individual shareholders (or Members) absent some further agreement with the creditor and the individuals.

4. The facts here show that Alex has used assets of the corporation to pay his personal obligations, apparently without valid corporate approval or purpose, or even the knowledge of his business partner Bernard, and in so doing so disregarded the corporate form. Commingling corporate assets with personal assets would likely support a successful argument that the "corporate veil" should be "pierced." *See Agway, Inc. v. Brooks,* 173 Vt. 260 (2001). Once the corporate form has been avoided,

the shareholders are treated as partners in an general partnership, and each would be personally liable for up to the full amount of the judgment. (An outstanding answer will note that the fact that Bernard was not aware of Alex's conduct will not relieve Bernard from liability, but may give rise to tort claims against Alex for reimbursement of any amounts for which Bernard is ultimately required to pay.)